IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010 / HCV 00602

BETWEEN	**CABLE & WIRELESS JAMAICA LIMITED (T/A LIME)**	**CLAIMANT**
AND	**ALLIANCE INVESTMENT MANAGEMENT LIMITED**	**DEFENDANT/ ANCILLARY CLAIMANT**
AND	**RELIANT ENTERPRISE COMMUNICATION LIMITED**	**ANCILLARY DEFENDANT**

IN CHAMBERS

Mrs. Denise Kitson and Mrs. Suzanne Risden-Foster instructed by Grant, Stewart, Phillips & Co. for the claimant

John G. Graham and Ms. Annaliesa Lindsay instructed by John G. Graham & Co. for the defendant/ ancillary claimant

HEARD: 8 July & 9 September 2011 and 2 March 2012

Contract – bank guarantee – guarantee given pursuant to Telecommunications Agreement – characteristics, meaning and effect of guarantee – construction of guarantee – whether guarantor contravenes terms of guarantee by refusing to pay on demand

Civil Procedure - summary judgment – judgment after determination of a preliminary issue of law – considerations to be applied in granting judgment – whether claimant entitled to judgment on a proper construction of the guarantee-CPR, rules 26.1 (2)(j); 15.2.

McDONALD-BISHOP, J

[1] This is an application brought by the claimant, Cable &Wireless Jamaica Limited (trading as LIME) (hereinafter referred to as C&WJ), against the defendant, Alliance Investment Management Limited (hereinafter referred to as Alliance). C&WJ is seeking the judgment of the court against Alliance after determination of a preliminary issue under the court's general powers of case management contained in rule 26.1 (2) (j) of

the CPR or for summary judgment against Alliance on the ground that Alliance has no real prospect of successfully defending the claim and/ or the preliminary issue pursuant to rule15.2 of the CPR.

Background

[2] The undisputed facts, as disclosed on the statements of case and the relevant evidence proffered in relation to this application, may be summarized as follows. The claimant, as is well known, is a company duly registered under the laws of Jamaica as a licensed provider of telecommunication services on the island. Indeed, it can safely be said that it is one of the giants in the country's telecommunications industry.

[3] Reliant Enterprise Communication Limited (Reliant), named as ancillary defendant, is a company also duly registered under the laws of Jamaica. It is a Service Provider licensed under the Telecommunications Act 2000 (the Act) to provide telecommunication services to the public.

[4] Pursuant to the provisions of the Act, C&WJ agrees to interconnect with Reliant upon the terms and conditions of an Interconnection Agreement entered into between them on or about 30 July 2003. Reliant also buys International Private Leased Circuits (IPLC's) from C&WJ which allows Reliant to convey and terminate international traffic on C&WJ's network as well as the network of other third parties.

[5] A term of the Interconnection Agreement, as contained in clause 28.1, is that Reliant would provide a bank guarantee from a bank licensed in Jamaica and approved by C&WJ as a financial guarantee for the payment of certain charges payable by Reliant to C&WJ. Clause 28.1 actually states in part:

> *"The provision of any and all Services by C&WJ to Telco in accordance with the Interconnection Agreement, and C&WJ's compliance with the terms of this Agreement are conditional on Telco keeping in place such guarantee which provides, at a minimum, a financial guarantee for the payment of the maximum Early Termination Charges payable by the Telco to C&WJ (pursuant to Part 1 of the Tariff Schedule) in the event of early termination of this Agreement."*

[6] Pursuant to this provision, Alliance, also a company duly registered under the laws of Jamaica, by a letter dated 28 January 2009, wrote to C&WJ stating in so far as is material to these proceedings.

> *Dear Sirs:*
>
> *Re: Reliant Enterprise Communications Ltd/*
> *Steve Twomey*
>
> *Pursuant to Clause 28.1 of the Interconnection Agreement made between Cable &Wireless Jamaica Limited ("C&WJ") and Reliant Enterprise Communications Limited ("RECL"), C&WJ has stipulated that RECL shall furnish C&WJ with an acceptable Guarantee by a guarantor approved by C&WJ, as security for RECL's obligations in accordance with the Interconnection Agreement.*
>
> *We have agreed to Guarantee with RECL, and we hereby affirm that we are Guarantor's and responsible to C&WJ, on behalf of RECL, up to an amount of $600,000.00 and no more, and we undertake to pay C&WJ without cavil or argument any sum or sums within (on a cumulative, aggregate basis)the limit of six hundred thousand United States Dollars (US$600,000.00),upon C&WJ providing us with a written demand for payment (without C&WJ needing to prove or show grounds).*
>
> *This guarantee will expire on May 1, 2009 ("The Expiry Date"), unless previously renewed and advised to C&WJ hereunder in writing, which is received by us on or before the Expiry Date shall be honoured by us and we shall have no liability in respect of any claim received by us after the Expiry Date…"*

This guarantee was given by Alliance under the hands of Robert G. Chin and Peter D. Chin, Vice President and President, respectively.

[7] On 30 June 2009, Alliance again gave another guarantee by letter to C&WJ in identical terms to the above guarantee of 28 January except that the expiry date was changed to 30 September 2009. The guarantee remains, in all other respects, the same as the previous one.

[8] On 30 September 2009, C&WJ, by a letter of even date addressed to Alliance (attention Mr. Peter D. Chin), indicated that it was "calling on the bank guarantee dated June 30, 2009" and asked that Alliance "make[s] immediate arrangement" to pay US$404,650.37 as partial claim on the amount for the guarantee Alliance had undertaken to pay. Nothing more was said about the guarantee or the sum being demanded.

[9] On 1 October 2009, Alliance, in writing, acknowledged receipt of C&WJ's demand but refused to pay the sum demanded. It raised objections to paying in full the sum demanded by C&WJ and indicated that it is liable to C&WJ on the guarantee only to the extent of J$5, 891,225.70. It proceeded to pay C&WJ this sum expressing that it represented "final settlement under [our] guarantee of June 30, 2009."

[10] C&WJ accepted the payment but refused to accept it as final settlement of the guarantee and this was communicated to Alliance. A flow of correspondence ensued between the parties with Alliance refusing to pay what was demanded and C&WJ indicating that it viewed the stance of Alliance as a breach of the terms of the guarantee. No amicable resolution was reached on the issue and so C&WJ initiated court proceedings by claim form filed on 15 February 2010. In that claim it seeks, inter alia, the sum of US$338, 484.02 (JA$30,370,072.51 at the exchange rate of JA$89.7238:US$1.00) being what it says to be the balance due and owing by Reliant to C&WJ under the terms of the Interconnection Agreement. The basis for the claim is that Alliance stands in breach of the guarantee of 30 June 2009.

[11] Alliance has not admitted this claim and has filed its defence in response. By way of defence, it states that, while it accepts that it has given the guarantee, its contention is that what is due and owing by it to C&WJ under the Interconnection Agreement has been duly paid and that C&WJ's interpretation of the guarantee is incorrect. It also denies that it had undertaken to pay sums due by Reliant to C&WJ without proof, justification or condition or without the need for C&WJ to prove or show grounds.

[12] It has, in turn, brought a counter-claim against C&WJ for several declarations relevant to the guarantee. These declarations being sought are to the following effect:

(i) It is only liable to C&WJ under its guarantee for the indebtedness incurred only under Reliant's Interconnection Agreement with C&WJ.
(ii) C&WJ is not entitled to recover under the guarantee dated 30 June 2009 sums already paid under the earlier guarantee for which the defendant had already paid the sum of US$300,000.00 on or before 4 May 2009.
(iii) C&WJ is not entitled to recover from it any sum due by Reliant by virtue of Reliant's additional agreement with C&WJ for the provision of International Private Leased Circuit Service (IPLCS)
(iv) The Interconnection Agreement between C&WJ and Reliant is distinct and separate from the IPLCS.
(v) The defendant had already settled its indebtedness under the guarantee by the payment of the JA$5,891, 225.70.

The Application

[13] The defence and counter-claim advanced by Alliance, in resisting C&WJ's claim to be paid under the guarantee, prompted C&WJ to make the application for court orders now under consideration. By this application, C&WJ seeks orders pertinent to the guarantee in the following terms:

(1) That on a proper construction of Alliance's letter of guarantee dated 30 June 2009 issued to C&WJ pursuant to clause 28.1 of the Interconnection Agreement between C&WJ and Reliant, Alliance is liable to pay any and all sums due and owing by Reliant up to the stipulated maximum of US$600,000.00 upon presentation of the written demand dated 30 September 2009 issued prior to the expiry of the said guarantee without cavil or argument and without C&WJ needing to prove or show grounds.
(2) That Alliance by its letter of 1 October 2009 failed to honour its guarantee dated 30 June 2009 when it challenged C&WJ's entitlement to the sums requested in C&WJ's written demand dated 30 September 2009.
(3) That, accordingly, Alliance has no real prospect of defending the claim and that summary judgment be granted in favour of C&WJ against Alliance in the sum of US$338,484.02 being the balance due and owing by Reliant to C&WJ under the terms of the Interconnection Agreement dated 30th July 2003 which Alliance undertook to pay upon written demand from C&WJ.

The parties' contention

[14] Alliance has strongly opposed C&WJ's application for judgment. Its contention, by way of opposition to the granting of the application, mirrors, essentially, the

averments contained in the defence and the terms of the declarations sought by way of counter-claim. The main planks of Ms. Lindsay's submissions are summarized as follows.

(i) Alliance's obligations to C&WJ only extend to those charges arising under the Interconnection Agreement and cannot include any liabilities or obligations under any "connected" or "interconnected contracts".

(ii) When the evidence offered by C&WJ (by way of the affidavit of Derrick Nelson, the relevant portions of which she has highlighted) is read, in conjunction with Reliant's statement of account, it is clear that the sums being claimed are not solely related to Reliant's obligations under the Interconnection Agreement which is a vital condition of the letter of guarantee. In particular, Alliance is not liable under the letter of guarantee for Reliant's obligations in relation to IPLC services.

(iii) C&WJ is claiming sums that ought to have been satisfied by previous amounts paid pursuant to the prior letter of guarantee and so C&WJ ought not to be entitled to recover twice, sums already paid by Alliance.

(iv) It is arguable, with "some prospect of success", that the sum being claimed by C&WJ is not an accurate reflection of Reliant's obligations to C&WJ under the Interconnection Agreement which is the determinative factor on the extent of Alliance's liability under the letter of guarantee.

(v) There is a serious issue to be tried and the necessity for evidence to be led in relation to whether the defendant is, in fact, liable under its letter of guarantee which is directly based on Reliant's outstanding obligations, if any, under the Interconnection Agreement.

(vi) The evidence at the very least discloses that there is a need for proper reconciliation of Reliant's accounts to be carried out in order for its true liability under the Interconnection Agreement to be ascertained. It follows from this that evidence ought to be led in order to determine the liability if any of Alliance in this matter.

C&WJ' s position

[15] C&WJ's position, as advocated on its behalf through the joint effort of Mrs. Kitson and Mrs. Risden-Foster, will now be summarized, in so far as is relevant at this juncture.

(i) As a matter of law, based on a proper construction of the letter of guarantee of 30 June 2009, Alliance is liable to pay C&WJ sums due and owing by Reliant under the terms of the Interconnection Agreement up to the stipulated maximum of US$600,000.00. Such sums as due and owing are payable upon the presentation of a written demand by C&WJ prior to the expiry of the said guarantee without cavil or argument or without the need for C&WJ to prove or show grounds. Therefore, Alliance, in refusing to satisfy C&WJ's demand for payment, and in raising the arguments now being raised, has acted in breach of the guarantee.

(ii) Alliance's interpretation of the guarantee is inconsistent with the unequivocal language of the guarantee required by clause 28.1 of the

Interconnection Agreement which is specifically to enable C&WJ to receive prompt and certain payment on the basis that, as between Alliance and C&WJ, Alliance unequivocally agreed not to concern itself with whether C&WJ had substantiated its claim for the sums due; once the said written demand had been made within the currency and limit of the guarantee Alliance would pay without cavil or argument.

(iii) Alliance's actions and stated reasons for its refusal to honour its obligations, in effect, seek to require C&WJ to substantiate its claim and thus constitute cavil or argument which is expressly excluded from the terms of the guarantee.

(iv) Even if the court disagrees with C&WJ, in respect of whether Alliance was entitled to require C&WJ to show grounds and justify and substantiate its claim for the sums claimed, the reasons proffered by Alliance can be easily answered by C&WJ in relation to the two grounds of objection stated by Alliance. In this regard, the affidavit evidence of Derrick Nelson relied on in this application has sufficiently answered those objections. That is specifically in relation to the IPLC and service purchased by Reliant from C&WJ and the issue of double payment. (In the interest of space and time, I will simply say that the contents of Mr. Nelson's affidavit have been duly read and his explanation on these two issues duly noted and considered).

(v) In effect, Alliance's action and reasons it has stated for its refusal to pay what is demanded, and requiring the claimant to substantiate the claim, constitutes cavil or argument which is expressly excluded from the terms of the guarantee.

(vi) Further, that even if there could be a possible challenge in relation to the sums claimed by C&WJ for IPLC services, (with which C&WJ has firmly joined issue), this would not affect the bulk of the claim for interconnect charges which, without question, fall squarely within the purpose for which the guarantee was issued by Alliance in relation to the obligations of Reliant under the terms of the Interconnection Agreement and which Alliance had promised to pay without cavil or argument or without the need to show grounds.

(vii) The payment of the amount of US$303,490.48 due for interconnect charges cannot be challenged by Alliance. So, if the court does not agree with the principal submission that the entire sum is due and payable, then, at the very least, judgment ought to be entered for C&WJ in respect of the sum of US$303,490.48, leaving the claim in respect of the sum of US$34,993.54 for the IPLC to proceed to trial.

The issues

[16] A consideration of the arguments advanced on behalf of the parties does reveal that although C&WJ has seen it fit to respond to the objection of Alliance by adducing evidence, its primary and most fundamental contention is that the objections raised by Alliance for failure to pay the sum demanded constitute cavil or argument or require it

(C&WJ) to show or prove grounds that are expressly excluded from the terms of the guarantee. C&WJ's primary position, as far as I have interpreted it to be, is that on this very fact alone, Alliance stands in breach of the guarantee with no realistic prospect of defending the claim.

[17] In light of the contention of C&WJ and the resistance by Alliance, I have identified, as the crucial question to be determined, the issue as to whether on a proper construction of the letter of guarantee and as a matter of law, Alliance stands in breach of that guarantee. This will then assist in the determination of the ultimate question as to whether C&WJ is entitled to immediate payment of the sum demanded and, therefore, judgment in its favour without the claim proceeding to trial. This will, of necessity, warrant an investigation into other subsidiary issues such as the wording, character, and the legal effect of the guarantee given, on the one hand, and the law pertaining to the granting of summary judgment, on the other.

The law applicable to the application for judgment

[18] Before proceeding to conduct an enquiry into the merits or demerits of the parties' respective cases, I consider it necessary to provide the legal framework within which my consideration of this application will have to take place. This application, is at the end of it all, a quest by C&WJ for judgment to be entered in its favour without a trial. It behoves me then to pay keen attention to the law as it relates to the granting of judgment on applications of this nature.

[19] Rule 26.1 of the CPR lists the powers of the court in the management of cases. Following on that, rule 26.1 (2) gives the court the power to dismiss or to give judgment on a claim after a decision on a preliminary issue (26. 1 (2) (j)). The same rule also empowers the court to take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective (26.1 (2) (v)).

[20] These provisions do give 'statutory' endorsement of the dicta of the Court of Appeal in the pre –CPR case, **Peter Williams et al v. United General Insurance Co. Ltd.** (1998) 35 J.L.R. 260 as pointed out by counsel for C&WJ. Their Lordships relied on

three cases, **European Asian Bank A-G v. Punjab and Sind Bank** [1983] 2 All E.R. 508; **R.G. Carter Ltd. v. Clarke** [1990] 2 All E.R. 209 and **Trinidad Home Developers Ltd. v. I.M.H. Investment Ltd.** [1989] 39 W.I.R. 335, to reinforce the point that where the issue to be determined in a case involves only a question of law and no dispute as to facts, then it is an appropriate case for the court to hear full arguments and to decide the point even if it would determine the outcome of the substantive matter. It saves time and costs. This, of course, would be in keeping with what is now known as the overriding objective now encapsulated in the CPR. It is therefore open to me on high authority to enter judgment after a determination of the preliminary question of law on this application.

[21] The application for summary judgment on the ground that the defendant has no real prospect of successfully defending the claim or issue is, of course, permissible by virtue of rule 15.2 of the CPR. The approach to be utilized and the considerations to be employed in summary judgment applications under the CPR have been authoritatively laid down in several cases and adopted by our courts. See, for instance, **Swain v Hillman** [2001] 1 All E.R. 91; **Three Rivers District Council v. Bank of England** (No.3) [2001] 2 All E.R. 513; **ED &F Man Liquid Products Ltd. v. Patel and anor**. [2003] Civ. 472 EWCA and **Gordon Stewart v. Merrick Samuels** (Unreported) SCCA no. 2/ 2005 delivered, November 18, 2005.

[22] From those cases, I have summarized some core principles relative to the consideration of summary judgment applications by which I am guided in my deliberations. These are re-stated to be as follows.

(I) The power to grant summary judgment as contained in Part 15 of the CPR is a power given to be exercised in the favour of a claimant or a defendant. It enables the court to dispose of a claim or defence which has no realistic prospect of being successful. The words *"no real prospect of being successful or succeeding"* speak for themselves and so they require no amplification.

(ii) The court is directed to see whether the statement of case in issue has a realistic, as opposed to a fanciful, prospect of success.

(iii) In seeking to ascertain the prospect of success of the particular case, the court is not entitled in the exercise of this power to conduct what might be a mini-trial.

(iv) However, while a mini-trial is not permissible, the court is not obliged to accept, without analysis, everything said by a party in his statements before the court. It may be quite clear in some cases, that the factual assertions being advanced have no real substance or merit, especially where they are contradicted by undisputed contemporary documents. Where that is so, issues which are dependent on those feeble or baseless factual assertions may be disposed of at an early stage to save the cost and delay in trying an issue, the outcome of which is inevitable.

(v) Also, it may be clear as a matter of law at the very outset that even if a party were to succeed in proving all the facts he asserts, he will not be entitled to the remedy he seeks. In such a case, the trial of the facts would be a waste of time and money and such a case would then be an appropriate one to be taken out of court as soon as possible.

(vi) On such application, the court's attention is essentially directed at the likely outcome of the case because what the court is interested in is the prospect of success of the statement of case in issue. Since, it is the prospect of success that is being evaluated, the court is permitted to form a provisional view of the likely outcome of the case.

(vii) Judges are to make use of the summary judgment powers given as it gives effect to the overriding objective and is in the interest of justice to do so.

[23] In addition to the foregoing, I will go further to state that I am also mindful that the application is coming before disclosure and the exchange of witness statements and that there is no opportunity given for cross-examination on disputed facts. I have also taken into account that a party can seek to amend his statement of case so as to improve its chances of success and so in determining whether there is a realistic, as opposed to a fanciful, prospect of the defence succeeding in this case, I have taken all these matters into consideration. It is with all these pertinent principles and caution in mind that I have considered the application before me.

Discussion and Findings

[24] In considering the issues involved in the case at hand, I do agree, and counsel for Alliance has also conceded, that this is a case that would be appropriate for the determination of the preliminary issue concerning the construction of the guarantee. That enquiry would not lend itself to any dispute as to facts or issues as to credibility that would warrant further investigation at trial. Therefore, it is left to be seen in the final analysis whether this is a case that is fit for judgment to be entered upon a proper

construction of the guarantee. I will now proceed to deal with the issues that have arisen in relation to the guarantee.

The Guarantee: wording, characteristics, meaning and effect

[25] C&WJ's primary view on Alliance's stance in refusing to pay the sum demanded is that the refusal constitutes a breach of the guarantee of 30 June 2009. C&WJ's position is that the "purported objections" raised by Alliance, as its reasons for failing to pay the sums due and owing, constitute cavil or argument and require C&WJ to prove grounds which are expressly excluded from the terms of its own guarantee. Alliance, on the other hand, has denied in its defence that it had undertaken to pay sums due by Reliant to C&WJ without the need for C&WJ to prove or show grounds and that it is liable to pay all sums due and owing without proof, justification or condition. In the light of all this, I have seen it necessary to first examine closely the wording of the guarantee.

[26] Having done so, I form the view that in the first paragraph of the letter issued by Alliance, there is what may be loosely described as being more like a 'preamble' to the guarantee itself. The words stated in that paragraph are not in the form or nature of an undertaking. It does no more than to show Alliance's recognition and acceptance of the fact that one of C&WJ's stipulations in the Interconnection Agreement with Reliant was for Reliant to provide a guarantor for its obligations connected with the agreement. It also points to Alliance indicating that it was pursuant to that stipulation of clause 28.1 that it was giving the undertaking contained in the second paragraph of the letter. It shows, in essence, the recognition by Alliance of the reason for and purpose of the guarantee being given.

[27] The terms of the undertaking or guarantee that was given in furtherance of clause 28.1, is, as far as I see it, contained in the second paragraph of the letter. In that paragraph Alliance, in my view, clearly and unambiguously affirmed that it was guaranteeing and assuming responsibility for Reliant's obligations within the maximum limit of US$600,000.00 that was stated. In that same paragraph, it undertook to pay C&WJ such sum or sums (on a cumulative or aggregate basis) upon a written demand submitted to it by C&WJ on or before the date of expiration of the guarantee.

[28] Further, it is seen that Alliance also affirmed/ agreed that it would pay the sum or sums demanded without cavil or argument or without C&WJ having to show or prove grounds. In this paragraph there is nothing to show that anything to do with the Interconnection Agreement was made a condition for payment under the guarantee. The effect of this, however, will be examined later.

[29] The question that now arises for consideration from the wording of this guarantee is: What are the characteristics, meaning and effect of this guarantee as a matter of law? In the light of the opposing arguments, I find it prudent to go back to 'first principles' as to the place, purpose and effect of guarantees in modern commercial life. This, I believe, may serve to shed some more light on the issue in dispute.

[30] For these purposes, I will commence with the meaning and explanation of the term given by Mark Hapgood in the well-known text **Paget's Law of Banking,** 11th edition at page 617, portions of which I will now paraphrase for convenience. A guarantee is a promise to be liable for the debt, or failure to perform some other legal obligation, of another. The person who makes the promise is the guarantor and the person whose obligation is guaranteed is the principal debtor.

[31] A guarantee may arise in two distinct situations. It arises in one situation when the guarantor undertakes that he is responsible for the principal debtor's obligation to the creditor and that he (the guarantor) will be liable to the creditor (beneficiary of the guarantee) if the principal debtor does not perform. In this situation, the guarantor's liability for the non-performance of the principal debtor's obligation is co-extensive with that obligation.

[32] In contrast is the second situation in which a guarantee may arise and this is where on a true construction of the promise, a primary or direct undertaking has been given to perform the principal debtor's obligation. If the obligation is of this nature, then the promise will be enforceable whether or not that of the principal debtor is enforceable.

[33] Where the construction gives rise to the first situation where the liability of the guarantor is secondary, then that is a suretyship or guarantee in the strict sense. In the second situation where liability would arise from a direct or primary undertaking, then that makes the promise a demand guarantee. The essential difference between these guarantees is that In the case of a suretyship, the surety's liability is co-extensive with that of the principal debtor and if default by the principal debtor is disputed by the surety, it must be proved by the creditor. That proposition, however, does not apply to a demand guarantee. The principle that underlies demand guarantees is autonomy. (See *Paget's* 13th edition at paragraph 34.2)

[34] It is, therefore, fair to say that a determination of the type of promise made and the nature of the obligation that arises from that promise will depend, in each case, upon the true construction of the actual words in which the promise is expressed.

[35] It is against this background that I have examined the actual words in which Alliance's promise was expressed and I find that I do agree with the argument advanced on behalf of C&WJ that the guarantee given by Alliance is in the form of a demand guarantee.

[36] Based on the authorities relied on by C&WJ in dealing with this question of the characteristics, meaning and effect of the undertaking as a demand guarantee and the argument of Ms. Lindsay for Alliance that the cases relied on are not in *pari materia* to the facts in the instant matter, I have considered it necessary to examine how demand guarantee relates to other payment undertakings commonly used in commercial life, such as performance bonds and letters of credit. This is imperative in order to provide a framework within which the principles applicable to demand guarantees are to be understood and to see whether the authorities relied on by C&WJ are, indeed, irrelevant and unhelpful as Ms. Lindsay has contended.

[37] On this issue, I have been ably guided by the helpful and pellucid discourse on the subject by Roy Goode in the text **Commercial Law**, 3rd edition, starting at page 1017. The learned author noted several points that I will highlight at this juncture.

(i) The words ‘guarantee’ and ‘performance bond’ are now used in two entirely different senses. In origin the word ‘guarantee’ denotes a suretyship contract in which the guarantor, or surety, assumes a liability to answer to the debt or default of another. The guarantor’s liability is therefore secondary in character, in that, the guarantor’s payment obligation does not arise until the principal debtor has defaulted and is, in principle, limited to the liability of the principal debtor.

(ii) Where the guarantee is by deed it is commonly termed a bond, and where the bond is to secure the performance of a non-monetary obligation, such as the execution of construction works under a building contract, it is labelled a performance bond.

(iii) But the term ‘guarantee’ and ‘performance bond’ are now also used to denote undertakings which are documentary in character. They have the character of documentary credit in that they are primary in form, being conditioned only by the presentation of a written demand for payment, and any other specified documents, without the issuing bank being concerned with whether there has been any actual default by the principal. Hence, such guarantees that only call for a written demand from the beneficiary are often referred to as on demand or simple guarantees.

(iv) Unlike documentary credits where it is intended that the bank shall be the first port of call for payment, demand guarantees and similar instruments are secondary in intent, their intention being to provide the beneficiary with a rapid access to payment if the principal defaults.

(v) With a demand guarantee, the bank is neither obliged nor entitled to go behind the specified documents and inquire whether the principal has defaulted. For this type of instrument the words ‘bank guarantee and ‘performance bond’ are synonymous; the bond is not by deed in the traditional sense.

(vi) The distinction of the various forms of payment undertakings (demand guarantees, on demand or first-demand performance bonds, and standby letters of credit) has become decidedly blurred and so many of the principles governing documentary credits apply equally to demand guarantees.

[38] Indeed, the connection between demand guarantees, on the one hand, and the other commercial payment undertakings, on the other, has been the subject matter of judicial deliberations in several decided cases, one of the most notable of which is the English Court of Appeal case of **Edward *Owen Engineering Ltd v Barclays Bank International Ltd and another*** [1978] 1 Lloyd’s Reports 166. This is a case substantially relied on by C&WJ. A synopsis of the facts is considered necessary.

[39] The facts as gleaned from the head notes are as follows:

> In 1976, a contract was entered into between the plaintiffs who were English suppliers of glasshouses and Libyan customers for the supply and installation of glasshouses. The contract provided that payment by the Libyan customers was to be in instalments, payable by an irrevocable confirmed letter of credit which was to be opened in favour of the plaintiffs payable at the defendant English bank.
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> Before the contract was concluded, the Libyan customers stipulated that there should be a performance bond and as a result, the defendants sent the Libyan bank (Umma Bank) a cable stating, inter alia, that upon its responsibility and on behalf of the plaintiffs, the bank was to issue a performance bond in favour of the Libyan customers. The guarantee was confirmed by the defendants to the Libyan Bank that it was "payable on demand without proof or condition".
>
> The Libyan Bank subsequently issued the performance bond which was addressed to the customers providing, inter alia, that it would stand as guarantors for the plaintiffs to the extent of a certain specified sum "recognising that this payment would be made upon first request from you".
>
> The plaintiffs subsequently repudiated the contract and the Libyan customers claimed on the performance bond. The Libyan bank claimed against the defendants. The plaintiffs applied for and obtained an injunction to prevent the defendants from paying the Libyan bank under the performance bond. The defendants applied to discharge the injunction. It was held by the first instance judge, Kerr, J that the performance bonds must be honoured between the banks and that the relation between the plaintiffs and the Libyan customers was no concern of the banks and the defendants ought to pay the Libyan bank and leave the plaintiffs to claim damages against the Libyan customers. The injunction was discharged.
>
> The plaintiffs, being dissatisfied with that ruling, appealed to the UK Court of Appeal. They asked the Court of Appeal to restore the injunction to prevent the defendants from paying on the performance bond issued by the Libyan bank and which the defendants had guaranteed to pay on behalf of the plaintiffs on demand without proof or conditions. However, the plaintiffs' appeal was dismissed by the Court of Appeal.

[40] Lord Denning, in delivering the lead judgment of the court, made several insightful observations that I have found instructive in these deliberations. The following represent my understanding of the core principles that may be distilled from Lord Denning's reasoning.

(i) The performance bond was, as far as the court was concerned at the time, a new creature but it bears many similarities to a letter of credit. It has long been established that when a letter of credit is issued by and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. The bank must honour the credit.

(ii) A performance guarantee or a performance bond is a guarantee of performance which one would expect would be enforced. Performance guarantees are virtually promissory notes payable on demand. As long as an honest demand is made by the beneficiary of the guarantee, the bank (guarantor) is bound to pay.

(iii) All this led to the conclusion that the performance guarantee stands on similar footing to a letter of credit. A bank (guarantor) that gives a performance guarantee must honour that guarantee according to its terms.

(iv) The bank (guarantor) is not concerned with the relationship between the principal and the beneficiary of the guarantee neither with the question as to whether the underlying contractual obligations have been performed by the beneficiary nor whether the principal is in default or not. The bank (guarantor) must pay according to its guarantee.

(v) If the term of the guarantee is that payment is to be made on demand without proof or conditions then, that is it, payment must be made without proof or conditions. The only exception is when there is clear fraud of which the bank (guarantor) had notice.

(vi) Since the defendant had given its guarantee to pay to the Libyan bank on demand without proof or condition and that demand had been made, the defendant had to honour it; the court could not interfere with the obligations of the defendant and the only remedy of the plaintiff would be to sue the Libyan customers for damages.

[41] Lord Denning, during the course of his reasoning, cited with approval (at page 171) the dicta of Kerr, J in **R.D. Harbottle (Mercantile Ltd. V. National Westminster Bank Ltd**. [1977] 3 WLR 752, 761, which I find to be rather instructive. Kerr, J stated:

> *"It is only in exceptional cases that the courts will interfere with the machinery of irrevocable obligations assumed by banks. They are the life-blood of international commerce. Such obligations are regarded as collateral to the underlying rights and obligations between the merchants at either end of the banking chain. Except possibly in clear cases of fraud of which the banks have notice, the courts will leave the merchants to settle their disputes under the contracts by litigation or arbitration as available to them or stipulated in the contracts. The courts are not concerned with their difficulties to enforce such claims; these are risks which the merchants take. In this case the plaintiffs took the risk of the unconditional wording of the guarantees. The machinery and commitments of banks are on a different level. They*

> *must be allowed to be honoured, free from interference by the courts. Otherwise, trust in international commerce could be irreparably damaged…."*

[42] Lord Denning also reminded us (page 171) of the dicta of Lord Justice Roskill in **Howe Richardson Scale Co. Ltd v Polimex- Cekop and National Westminster Bank Ltd** [1978] 1 Lloyd's Rep. 161, 165, which I, too, find useful. His Lordship stated:

> *"Whether the obligation arises under a letter of credit or under a guarantee, the obligation of the bank is to perform that which it is required to perform by that particular contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the bank here is simply concerned to see whether the event has happened upon which its obligation to pay has arisen."*

[43] Further, Lord Justice Browne, in agreeing with Lord Denning in **Edward Owen Engineering**, went on to express the view that the 'event' that was to have happened for payment to be made under the performance bond was the demand by the beneficiary (the Libyan bank) on the guarantor (the defendants), the defendants having agreed to pay without proof or condition. The guarantee was declared to be an unconditional one.

[44] **Edward Owen Engineering** does demonstrate that the payment undertaking instruments, that is to say, performance bonds, performance guarantees, demand guarantees and letters of credit, are not as different in their legal character and effect as the differences in labeling would tend to suggest.

[45] Mrs. Kitson, in the light of that decision and the reasoning on which it was based, has advanced the argument on behalf of C&WJ, that the guarantee in issue can be equated with a performance guarantee which, as Lord Denning put it, is virtually a promissory note payable on demand. She also pointed out that Lord Denning's description of a demand guarantee being akin to a promissory note has been widely

accepted in common law jurisdictions worldwide (***Paget's*** 13th edition at paragraph 34.2).

[46] On my examination of the letter of guarantee issued by Alliance and in the light of the principles emanating from the relevant authorities on the subject, I do conclude that the guarantee given by Alliance is, indeed, a demand guarantee which is akin to a promissory note. As such, it does stand on similar footing as a letter of credit (to borrow Lord Denning's words).

[47] It would stand to reason too that as a demand guarantee, it is autonomous. This means, in effect, that it is a separate and distinct contract from the contract on which it is based. That is to say, in the context of this case, that Alliance's guarantee is separate and distinct from the Interconnection Agreement between C&WJ and Reliant on which it is based. As such, the obligations of Alliance, as guarantor, ought not to be affected by any dispute or issue arising from the underlying contracts between C&WJ and Reliant. That is a matter that would have to be settled between them which would not and should not concern Alliance.

[48] The following extract from Paget's (13th edition paragraph 34.2) illustrates the operation of the autonomy principle underlying demand guarantees.

> *"If the beneficiary makes an honest demand, it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honour the demand, the principal must reimburse the guarantor (or counter guarantor), and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of the contract between them must be resolved in separate proceedings to which the guarantor bank will not be a party. As Potter LJ explained in* ***Comdel Commodities Ltd v. Siporex Trade SA".***

[49] The rationale for this approach can be deduced from the reasoning of Hirst, J in **Siporex Trade SA v. Banque Indosuez** [1986] 2 Lloyd's Rep. 146 where he stated that the whole commercial purpose of a performance bond is to provide a security which is

to be readily, promptly and assuredly realisable when the prescribed event occurs. This purpose, he said, is reflected in the provision that it should be payable on first demand.

[50] Having considered the characteristics of the guarantee in this case and found it to be a demand guarantee, I will now take my analysis further in determining its meaning and effect. This is following on the lead of the authorities on the subject that where the determination is made upon the construction of an instrument that it is a demand guarantee, then, the next question that arises is whether payment had been demanded in conformity with its terms. I will now examine this question within the context of the case.

[51] It is C&WJ's position that payment has been demanded in accordance with the terms of the guarantee. Alliance contends otherwise. Mrs. Kitson, in dealing with the terms of the guarantee, made the point that the terms of the guarantee is as is contained in the second paragraph of the letter from Alliance to C&WJ in which the guarantee was given.

[52] In directing attention to the particular terms of the second paragraph, learned counsel submitted that the decision in **Edward Owen Engineering** is, particularly, relevant, in that, the guarantee in question in that case stipulated that liability would accrue on presentation of demand without any conditions or proof which is very similar to the guarantee under review in this case. She submitted that the court, in applying that principle, ought to impose liability on Alliance to honour the obligations of Reliant due to C&WJ under the Interconnection Agreement without cavil or argument or without the need for C&WJ to show grounds.

[53] Learned counsel continued by saying that the only exception to this strict application of the law is in the case of fraud which is not applicable in the instant matter, there being no allegation of fraud made by Alliance and which C&WJ has notice. She went on to say that the dictum of Lord Denning in ***Edward Owen Engineering*** is adopted to the effect that Alliance, which gave a performance guarantee, must honour that guarantee according to its terms and that it is not to be concerned with the relationship between C&WJ and Reliant or with the question of whether C&WJ or

Reliant has performed its contractual obligations. Neither should it be concerned with the question of whether Reliant is in default. Rather, Alliance must pay according to its guarantee on demand as so stipulated without proof or conditions given that no question of fraud arises in this case.

[54] Mrs. Kitson also sought to fortify C&WJ's position through reliance on dicta from **Esal (Commodities) Ltd. and Reltor Ltd v Oriental Credit Ltd. and Wells Fargo Bank** [1985] 2 Lloyd's Reports 546. There, the court was concerned with the question as to whether liability under a performance bond was conditional where the undertaking read:

> *"We undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance …."*

[55] The court in coming to its decision reasoned, inter alia, that if the performance bond was conditional, then unless there was clear evidence that the seller admitted that he was in breach of the contract of sale, payment could never safely be made by the bank except on a judgment of a competent court of jurisdiction and the result would be wholly inconsistent with the entire object of the transaction which was to enable the beneficiary to obtain prompt and certain payment. However, the court concluded that on the facts of that case, in addition to the beneficiary making demand, he must also inform the bank it did so on the basis provided for in the performance bond.

[56] This case demonstrates quite clearly that the demand must be made in accordance with the terms of the guarantee. It follows that where there is no condition stipulated, then none can be asserted. To impose conditions not provided for and requiring proof of matters not stipulated by the terms of the guarantee would be inconsistent with the object of that transaction which is for the beneficiary to receive prompt settlement of its demand.

[57] In ***Siporex Trade S. A. v Banque Indosuez*** [1986] 2 Lloyd's Reports 146, another case relied on by C&WJ, several issues arose concerning the terms and effect of performance bonds and letters of credit given by guarantors. Hirst, J., in speaking to

the essential purpose of such instruments as being "to provide a security which was to be readily, promptly and assuredly realized when the prescribed event occurred", further noted:

> *"A performance bond is a commercial instrument. No bank is obliged to enter into it unless they wish to and no doubt when they do so they properly exact commercial terms and protected themselves by suitable cross-indemnities; such as were entered into the present case. For all these reasons I hold that the obligations under these two performance bonds were absolute."*

[58] Even more importantly, his Lordship, in coming to that conclusion, found that on the facts and the evidence before him, both letters of demand were good demands in compliance with the requirement of the performance bonds themselves. This case is, therefore, useful for demonstrating the point that the demand made on the guarantee must be in conformity with the terms of the guarantee itself and once that is so, the obligation to make good the promise arises.

[59] I take all the foregoing to mean that if there is a condition to be fulfilled for the demand to be satisfied, then that condition must be satisfied and, so, it follows that where there is no condition provided for, then none should be imposed to operate as a bar to payment. The obligation of the guarantor is to perform that which he is required to perform by the terms of the particular contract and nothing else.

[60] I find, after a review of the relevant authorities and exposition on the subject, that Ms. Lindsay's submission that the cases cited on behalf of C&WJ, dealing with letters of credit and performance bonds are irrelevant and, therefore, unhelpful in these proceedings, is rendered unsustainable in the glare of the authorities. I find the principles distilled from the cases to be quite instructive and useful in my deliberations.

[61] So, upon using the legal principles garnered from the various authorities that have been reviewed as my guide, I find that on a proper and literal reading of the guarantee in this case that the only trigger event stipulated for payment by Alliance is a written demand claiming a sum within the maximum limit and made on or before the

expiry date. It means that upon that event, Alliance's obligation to pay under the guarantee arose.

[62] However, notwithstanding that fact, Alliance, rather than paying, raised objections and refused to satisfy the demand. In the light of Alliance's stance, I have closely examined the guarantee and I am yet to see a condition for payment that had been stipulated that has not been satisfied by C&WJ within the terms of the guarantee. More specifically, there is no term in the guarantee stating that payment is conditional on Reliant defaulting or that proof by C&WJ of such default is required. There is no condition stipulated that payment would require submission of any documentary proof of Reliant's obligations such as a statement of account or invoices and/or evidence that the charges properly arise under the Interconnection Agreement.

[63] The fact that a statement of account was presented, with which Alliance is now taking issue, does not take away from the fact that it had given a guarantee that has no condition whatsoever providing that payment would only be made upon presentation of a true and accurate statement of Reliant's obligations. So, even if discrepancies are noted in such statement of account, which up to now there is no clear evidence of such coming from Alliance, that would have no bearing on the guarantee given by Alliance, unless fraud, of which C&WJ has notice, is alleged. There is no allegation of fraud, or even at bare minimum, dishonesty.

[64] It is also realized too that in raising arguments about demand for payment in respect of certain charges not falling under the Interconnection Agreement, Alliance is, in effect, requiring C&WJ to provide proof to substantiate or justify its claim that the charges are connected to Reliant's obligation under the agreement. Part of the proof required in this regard would be evidence as to the terms and conditions of the Interconnection Agreement to show that all payments demanded properly fall within the agreement.

[65] This would require the court to go to construe that agreement which is not the concern of Alliance and which does not form part of the guarantee even though the guarantee was given as a result of it and for purposes connected with it.

[66] The Interconnection Agreement forms the underlying contractual relationship between C&WJ and Reliant. Alliance's guarantee is separate from that and is autonomous of it. There is no term of the guarantee that payment of the sum demanded was conditional on verification of charges as properly falling within the Interconnection Agreement. Alliance, by raising objection concerning the underlying agreement between Reliant and C&WJ is, in effect, seeking to put C&WJ in a position to prove the charges or to otherwise show ground for its demand. This is not at all in keeping with the clear words of the guarantee.

[67] The guarantee expressly stated that once the requisite event occurs, then payment would be made without C&WJ having to show grounds or proof. Alliance gave its words that it would pay upon written demand the sums requested by C&WJ up to US$600,000.00 on or before the expiry date; nothing more. A written demand was made for a sum falling within the stipulated limit and made on the date the guarantee was due to expire.

[68] Alliance cannot, with all honesty, say that the sum demanded did not fall within the stipulated limit and that it was not made in time. Neither can it say that the demand was not in writing. These were the expressed terms of the agreement that C&WJ needed to fulfill in order to be paid on its demand. Without question, C&WJ had fulfilled the conditions of the guarantee and the performance of its side of the bargain was in keeping with the guarantee.

[69] In **Edward Owen Engineering**, Lord Justice Browne, in agreeing with Lord Denning that the appeal should be dismissed, reiterated what was said in **Howe Richardson Scale Co.** (supra) that the bank was simply concerned to see whether the event had happened upon which its obligation to pay had arisen. His Lordship then stated:

> *"The "event" in the present case was the demand by Umma bank on Barclays Bank. Barclays Bank had agreed to pay without conditions or proof. They are not concerned with the dispute between the plaintiffs and the Executive authority under the underlying contract."*

[70] I would apply this line of reasoning to the instant case and hold that the event in this case had occurred upon which the obligation for Alliance to pay has arisen without C&WJ having to show or prove ground for the demand. The terms and effect of the guarantee in this case is not different in any material way from the performance bond in **Edward Owen Engineering**. Alliance had agreed to pay without proof and without condition except as to the maximum limit and the time within which payment is to be made.

[71] I will go further and say that not only did Alliance, by the terms of the guarantee, require no proof or justification from C&WJ of its demand, it had promised to pay without "cavil or argument". The dictionary meaning of *cavil* is '*unnecessary complaint"* while argument means in one sense, "*a set of reasons given in support of an action or opinion*" and, in another sense, "*a serious or angry discussion between people who disagree with each other.*" (Little Oxford English Dictionary)

[72] As far as I can see on the terms of the guarantee and the stance taken by Alliance that Alliance has raised cavil and argument within the proper meanings of those terms and that is in contravention of the express terms of the guarantee. Alliance, by agreeing to pay without cavil or argument or without C&WJ giving any proof or grounds for the demand it makes, had voluntarily assumed the risk of erroneous, or even dishonest, demand but that is the risk it took by giving an unconditional guarantee. It is therefore bound by the terms of it.

[73] In the final analysis, I do find that Alliance had stepped outside the bounds of its guarantee from the date it refused to pay C&WJ on 29 September 2009 and any arguments now being used to resist payment on such grounds cannot avail it. It had agreed to pay without unnecessary complaint or argument and without proof and justification of anything. It must do what it had undertaken and is obliged to do, that is,

to pay the sum demanded without cavil or argument and without C&WJ proving its claim or showing the reason for its claim.

Findings

[74] In concluding, I will now declare my findings on this application in keeping with the application and the terms of the orders sought by C&WJ.

(i) On the preliminary issue as to the construction of the guarantee, I hold that as a matter of law on a proper construction of the demand guarantee issued by Alliance in favour of C&WJ on 30 June 2009, Alliance has raised cavil or argument and is requiring C&WJ to prove or show grounds for its demand which is in contravention of the terms of the said guarantee.

(ii) On a proper construction of the said guarantee, I find that the letter dated 1 October 2009 issued by Alliance cannot negate or defer its contractual obligation to pay as it amounts to cavil and argument and is requiring proof and justification which is not permitted by the terms of the guarantee. Alliance, by refusing to pay, has breached the guarantee.

(iii) Alliance is not entitled to challenge the demand made by C&WJ in order to avoid payment of the sum demanded under the guarantee by seeking to treat with the underlying contractual arrangements embodied in the Interconnection Agreement between C&WJ and Reliant. That is a matter for C&WJ and Reliant and so in the absence of fraud (which, incidentally, Alliance has not alleged), any sum paid over by Alliance to C&WJ within the terms of the guarantee may be recovered from Reliant by Alliance, at least, on the basis of an implied indemnity created by law. The existence of an ancillary claim in these proceedings, as permitted by a prior order of the court, in which Reliant is named as an ancillary defendant attests to the availability of redress for Alliance against Reliant for the recovery of all sums paid under the guarantee.

(iv) Alliance is immediately liable to pay to C&WJ the sum of US$338,484.02 being the balance demanded as being due and owing by Reliant to C&WJ under the terms of the said Interconnection Agreement.

(v) The claim, as it rests on the construction of the letter of guarantee, and the conduct of the parties in relation thereto, renders the case an appropriate one in which judgment may be entered after a determination of the preliminary issue.

(vi) I will go beyond that to say, however, that my conclusions on the preliminary issue have led me to a finding that the defence, as filed, does not reveal a realistic prospect of success on any issue. The argument advanced by the defendant, in the light of the guarantee, cannot sustain a viable defence or its counter-claim. I see no chance of the defence being improved over time with disclosure, the exchange of witness statements or, even, possible amendment.

(vii) C&WJ succeeds on the preliminary issue which is, indeed, determinative of the claim.

(viii) C&WJ is, therefore, entitled to summary judgment on the claim against the defendant in the sum of US$338,484.02 as claimed.

ORDER

[75] The order of the court shall be as follows:

1. Judgment for the claimant in the sum of US$338,484.02 (equivalent to the sum of JA$30,370,072.51 at the exchange rate of JA$89.7238: US$1.00) with interest thereon at 3% p.a. as of 30 September 2009 until payment. (Claim for commercial interest denied in the absence of evidence.)

2. The counter-claim is dismissed.

3. Costs to the claimant with Special Certificate for two counsel as prayed.